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No. 07-562

IN THE
Supreme Court of the United States

PHILIP MORRIS USA INC. AND ALTRIA GROUP, INC.,
Petitioners,

v.

STEPHANIE GOOD, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL AND ADMINISTRATIVE LAW SCHOLARS IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICUS CURIAE* CONSTITUTIONAL AND ADMINISTRATIVE LAW SCHOLARS IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICI*

Amici are law professors who teach and write in the areas of constitutional and administrative law and legislation.[1] Erwin Chemerinsky is Dean of the

[1] Counsel for all parties have consented to the filing of this brief, and those consents are on file with the Clerk of the Court. Pursuant to Rule 37.6, *Amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution to the preparation or

Donald Bren School of Law of the University of California at Irvine, as well as a scholar of Constitutional Law and Federal Jurisdiction. David Dana is Professor of Law and Associate Dean for Faculty and Research at Northwestern University School of Law, where he teaches Environmental and Constitutional Law. Philip Frickey is the Alexander F. and May T. Morrison Professor of Law at the University of California, Berkeley, School of Law, where he teaches Legislation and Constitutional Law. Stephen Gardbaum is Professor of Law at the University of California at Los Angeles, where he teaches Constitutional Law and Comparative Law. Paul McGreal is Professor of Law at Southern Illinois University School of Law, where he teaches Constitutional Law. Nina Mendelson is Professor of Law at the University of Michigan Law School, where she teaches Constitutional Law as well as Environmental, Labor, and Employment Law. Theodore Ruger is Professor of Law at the University of Pennsylvania Law School, where he teaches Constitutional Law, Food and Drug Regulation, Legislation, and Health Law. Neil Siegel is Associate Professor of Law and Political Science at Duke University, where he teaches Constitutional Law. Wendy Wagner is the Joseph A. Worsham Centennial Professor at the University of Texas School of Law, where she teaches Environmental Law and Torts. Philip Weiser is Professor of Law and Associate Dean for Research at the University of Colorado School of Law, where he teaches Constitutional and

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submission of this brief, and that no person other than *Amici* and their counsel made such a monetary contribution.

Telecommunications Law. Ernest Young is Professor of Law at Duke Law School, where he teaches Constitutional Law and Federal Courts.

Each of us has written on the general question of federal preemption of state law, and many of us have focused on the particular question of preemption under federal regulatory statutes that delegate important roles to administrative agencies. This brief is an effort to bring that scholarship to bear on the particular case now before the Court.

SUMMARY OF ARGUMENT

This brief seeks to make four principal points. The first is simply to situate the particular statutory preemption issues in this case in the broader context of this Court's federalism doctrine. Preemption cases in different areas—e.g., cigarette labeling, medical drugs and devices, banking, auto safety—often present themselves as unrelated disputes raising specific questions under specific statutes. But they also present common questions concerning the relevant canons of statutory construction and the role of administrative agencies. How the Court answers these sorts of questions has an even greater impact on the constitutional value of balance between State and National authority than the outcomes of this Court's relatively rare decisions under the Commerce Clause or the Eleventh Amendment. Because of the difficulty of developing workable and stable constitutional doctrine that meaningfully protects state autonomy under the relevant constitutional provisions, statutory rules like this Court's "presumption against preemption," *see Rice v. Santa*

Fe Elevator Co., 331 U.S. 218, 230 (1947), are the most critical component of this Court's federalism doctrine. To say this is not to determine the outcome of any particular case, but it does suggest a lens through which this Court should view preemption disputes.

The second and third points bear on Petitioners' express preemption argument. Petitioners read this Court's recent cases as stating a general proposition that "state-law claims are preempted where they seek to apply a generally applicable state-law obligation to specific factual allegations that fall within the scope of an express preemption clause." Pet'rs' Br. at 18. None of the relevant cases says this, and in fact such a rule would directly contradict the way this Court treats generally applicable laws in other contexts. Petitioners' novel notion that preemption clauses automatically create "carve-outs" from all generally applicable state laws would radically destabilize state law enforcement.

Petitioners' argument that the Labeling Act delegates exclusive regulatory authority to the Federal Trade Commission likewise implicates an important general point: Congress frequently delegates enforcement authority to federal agencies, but such delegations are generally concurrent with state authority. State regulation will often have distinctive institutional and remedial advantages not captured by federal agency action: it may provide compensation for victims, and it may be more democratically accountable. Hence, the Court should presumptively construe delegations to federal agencies as concurrent, rather than exclusive. This

approach is particularly appropriate in the case of the FTC, particularly at the time that the Labeling Act was enacted, when the FTC's own enforcement powers were both quite limited and plainly concurrent with those of the States.

Finally, Petitioners' *implied* preemption claim turns on the sort of agency action that can preempt state law. We urge that any preemptive effect of agency action must be grounded in *Congress*'s action. An agency may preempt state law when it either (1) interprets a federal statute as preempting state law, or (2) exercises delegated authority to act with the force of law. Petitioners do not seriously contend that Maine's consumer protection law conflicts with the Labeling Act; instead, the asserted conflict stems from the FTC's "low tar policy." Pet'rs' Br. at 46. But agency "policies" do not preempt state law unless they are promulgated pursuant to delegated authority to act with the force of law. Here, no one contends that the FTC has articulated its policy through the specific rulemaking procedures prescribed by Congress or through an authoritative adjudication.

ARGUMENT

I. This Court should narrowly construe the preemptive effects of federal regulatory statutes.

Every preemption case implicates a specific body of statutory law, but preemption also occupies a critical place in the overall structure of federalism doctrine. Although the constitutional doctrine of enumerated powers imposes some limit on Congress's

reach, *see U.S. v. Lopez*, 514 U.S. 549 (1995); *U.S. v. Morrison*, 529 U.S. 598 (2000), this Court has not questioned its New Deal-era cases according broad scope to the Commerce Power, and it has continued to uphold federal legislative action that reaches deep into areas of traditional state regulation, *see Gonzales v. Raich*, 545 U.S. 1 (2005). Practically speaking, the most important limits on federal authority are found not in the Constitution itself but in the terms of the statutes that Congress enacts. *See, e.g., Gonzales v. Oregon*, 546 U.S. 243 (2006) (holding that the Attorney General exceeded his statutory authority in attempting to preempt Oregon's physician-assisted suicide law). It is those statutory limits that are at issue in preemption cases. As Justice Breyer has observed,

> [I]n today's world, filled with legal complexity, the true test of federalist principle may lie, not in the occasional effort to trim Congress' commerce power at its edges, . . . or to protect a State's treasury from a private damages action, . . . but rather in those many statutory cases where courts interpret the mass of technical detail that is the ordinary diet of the law.

Egelhoff v. Egelhoff, 532 U.S. 141, 161 (2001) (Breyer, J., dissenting). Preemption doctrine should thus be constructed and applied with an eye toward its effect on the federalism balance more generally.

The keystone of this Court's preemption doctrine is the "presumption against preemption" articulated in *Rice v. Santa Fe Elevator Co.*, 331 U.S. 218 (1947). Under the *Rice* presumption, the judicial inquiry in preemption cases "start[s] with the

assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 230. This rule of statutory construction developed during the same era that this Court was expanding its interpretation of Congress's legislative powers. *See, e.g., Wickard v. Filburn*, 317 U.S. 111 (1942). This timing was no coincidence: the pre-Rice approach, which generally held that any federal regulation in a field broadly preempted state law, *see, e.g., Chicago, Rock Island & Pac. Ry. Co. v. Hardwick Farmers Elevator Co.*, 226 U.S. 426, 435 (1913), was workable so long as federal regulation was narrowly confined; once federal authority expanded to presumptively cover most areas of life, however, a rule of presumptive field preemption would have obliterated state regulatory authority altogether. *See generally* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 806 (1994). The presumption against preemption thus maintains a viable role for state regulation in a world in which state and federal regulatory authority are largely concurrent.

The *Rice* presumption fits well with the institutional role that this Court has staked out in enforcing the federal balance.[2] The Court has struggled to derive clear constitutional lines limiting Congress's authority from the spare structural provisions of the constitutional text. *See, e.g.*, Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial*

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[2] *See generally* Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 130-34 (2004).

Enforcement of Federalism, 68 S. CAL. L. REV. 1447, 1450-53 (1995). More than two centuries of doctrinal history suggests that this Court is unlikely to develop Commerce Clause criteria that are sufficiently determinate to be stable and avoid the appearance of judicial policy-making, on the one hand, and sufficiently constraining to protect a meaningful sphere of state regulatory autonomy, on the other. Instead, the Court has recognized that political and institutional factors built into the Constitutional structure itself often work to protect the federal balance, *see Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528, 550-54 (1985), and it has tailored the judicial role to facilitate and enhance the operation of these political and institutional checks.[3] *See, e.g.*, *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) (holding that state law generally can be displaced only by the operation of the federal legislative

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[3] Much the same thing has happened in administrative law. Recognizing the difficulty of formulating judicially-enforceable principles limiting the delegation of Congress's legislative authority to federal administrative agencies, the Court has instead focused on enforcing the *statutory* limits of agency authority through judicial review under the Administrative Procedure Act. *See, e.g.*, *Whitman v. American Trucking Assns.*, 531 U.S. 457, 474-75 (2001) (acknowledging the Court's reluctance to second-guess Congress on the scope of permissible delegations); CASS R. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE 143 (1990) ("Broad delegations of power to regulatory agencies, questionable in light of the grant of legislative power to Congress in Article I of the Constitution, have been allowed largely on the assumption that courts would be available to ensure agency fidelity to whatever statutory directives have been issued.").

process); *Printz v. U.S.*, 521 U.S. 898 (1997) (requiring Congress to internalize the political and financial costs of its actions by forbidding the "commandeering" of state officers to enforce federal law). Two aspects of these checks are critical: the political representation of the States in Congress, *see* Herbert Wechsler, *The Political Safeguards of Federalism: The Rôle of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), and the procedural difficulty of federal lawmaking through the Article I legislative process, *see* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1330 (2001). These political and procedural safeguards of federalism ensure that federal measures that supplant state regulatory authority can be opposed by the States' representatives in Congress, and the procedural hurdles to federal legislation tend to hold down the overall output of preemptive federal law.[4]

This Court has facilitated these political and procedural safeguards of state autonomy by developing a variety of "clear statement" rules of statutory construction. William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593 (1992). These rules are not

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[4] The signatories to this brief have different views as to the extent to which this Court should exercise an independent check on Congress's authority, *see, e.g., U.S. v. Lopez*, 514 U.S. 549 (1995), in addition to enforcing the process-based checks recognized in *Garcia*. But we all agree that, *at a minimum*, the Court should enforce process-based rules like the presumption against preemption.

"constitutional" in the sense that they require invalidation of federal statutes, but they serve the constitutional function of helping to maintain the tenuous balance between state and federal authority. Hence, Congress must speak clearly when it subjects state governments to generally-applicable federal laws, *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1992), imposes conditions on the States' receipt of federal funds, *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006), subjects the States to liability under federal statutes, *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989), or regulates at the outer limits of its authority under the Commerce Clause, *Jones v. U.S.*, 529 U.S. 848, 858 (2000). This Court explained the rationale for such rules in *Gregory*:

> [I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise. 'To give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which *Garcia* relied to protect states' interests.'

501 U.S. at 464 (quoting L. Tribe, *American Constitutional Law* § 6-25, p. 480 (2d ed. 1988)).[5]

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[5] *See also U.S. v. Bass*, 404 U.S. 336, 349 (1971) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.").

Rice's presumption against preemption is the most important such rule. Preemption cases routinely implicate the core regulatory concerns of state governance—concerns that are protected imperfectly, at best, by this Court's *constitutional* distinction between "economic" and "noneconomic" activity. *See Morrison,* 529 U.S. at 613. Recent preemption cases in this Court have concerned, *inter alia*, regulatory control over the local telephone market, *AT&T Corp. v Iowa Utils. Bd.*, 525 U.S. 366 (1999), protection of state waterways from catastrophic oil spills, *U.S. v. Locke*, 529 U.S. 89 (2000), state policy experimentation in health care, *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002), and medical ethics, *Gonzales v. Oregon*, 546 U.S. 243 (2006), as well as the States' traditional ability to provide tort remedies for their citizens, *Bates v. Dow Agrosciences, L.L.C.*, 544 U.S. 431 (2005). The stakes for federalism in preemption cases are thus very high. That is why it is important to see these cases not simply as concerning the particular statutory regime under which they arise, but also the broader *constitutional* concern with balance in our federal system.

II. Plaintiffs' Claims Are Not Expressly Preempted.

This Court held in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 523 (1992) (plurality), that the Labeling Act does not preempt all state-law claims

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For a decision specifically applying this "political safeguards" rationale for clear-statement rules to limit the preemptive effect of the FTC's rulemaking authority, *see California St. Bd. of Optometry v. FTC*, 910 F.2d 976, 979-82 (D.C. Cir. 1990).

having to do with cigarette advertising. That outcome requires close parsing of plaintiffs' claims to determine whether they fall within or without the scope of federal preemption—a task that we leave for the Respondents' Brief. Our concern is rather to refute two key arguments advanced by Petitioners: first, that "a general state-law obligation—such as the duty not to engage in deceptive advertising—is preempted when it is applied to a specific set of facts encompassed by the terms of an express preemption," Pet'rs' Br. at 22-23, and second, that the Labeling Act should be construed to confer *exclusive* regulatory authority over cigarette advertising upon the Federal Trade Commission, *id.* at 26-29. This Court should not lightly construe federal statutes to confer exclusive regulatory authority upon federal agencies. That is particularly true of the particular agency at issue in this case.

A. Generally-applicable state laws are presumptively not preempted by specific preemption clauses.

Petitioners read this Court's recent preemption cases to embody a novel proposition that "state-law claims are preempted where they seek to apply a generally applicable state-law obligation to specific factual allegations that fall within the scope of an express preemption clause." Pet'rs' Br. at 18. These cases do not actually say this, and their reasoning in each instance turns on a more nuanced analysis. That is not surprising, because Petitioners' reading is flatly inconsistent with this Court's general approach to generally applicable laws.

This Court has held that even constitutional protection for an individual right does not require an automatic exemption from the coverage of generally applicable laws. In *Employment Division v. Smith*, 494 U.S. 872, 878-87 (1990), this Court held that the right to free exercise of religion did not require that religiously-motivated use of peyote be exempted from generally-applicable narcotics laws, so long as those laws were not directed at religion.[6] The same approach applies in cases concerning federal causes of action adjudicated in state courts: state procedures are preempted only if they discriminate against or (possibly) if they unduly burden the exercise of federal rights. *Johnson v. Fankell*, 520 U.S. 911, 918-19 (1997); *Felder v. Casey*, 487 U.S. 131, 141-42 (1988). In each of these situations, state law does not give way simply because it intersects with an area of federal right; rather, state law is generally invalid only where it targets or directly interferes with federal law.

To be sure, there are cases in which a generally applicable state law sufficiently burdens a federal right that state law must yield. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to

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[6] *See also Illinois v. Telemarketing Assocs.*, 538 U.S. 600, 610, 623-24 (2003) (upholding enforcement of generally-applicable state antifraud laws against political fundraisers); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986) (upholding a generally-applicable state law requiring closure of any place of prostitution, even when that law was applied to a book store selling constitutionally-protected literature).

send their children to school). But such cases simply demonstrate that principles of *conflict* preemption remain available to protect federal policy from generally applicable state laws. Moreover, this Court has recognized that it need not construe the preemptive effects of federal statutes broadly where a federal agency retains power to take preemptive action in the event of a conflict with federal policy. *Hillsborough Cty. v. Automated Laboratories, Inc.*, 471 U.S. 707, 721 (1985). This Court's cases thus suggest that narrow express preemption clauses should ordinarily *not* be read to preempt generally applicable state laws.

Congress may wish for federal law to provide the only operative rules of a particular kind—e.g., prescribed labels for cigarette packages—but it is difficult to anticipate the full range of generally applicable state laws that might conceivably overlap with a particular federal regulation in specific circumstances. Petitioners' broad rule of preemption would thus introduce considerable uncertainty into state regulatory efforts, as state actors will have to anticipate a virtually infinite range of possible exemptions where general state laws apply to the same factual situations as particular federal rules. Express preemption should thus be confined to circumstances where state regulators have sought to regulate the actual subject matter encompassed by a statutory preemption clause.

The Labeling Act saves generally-applicable state laws by limiting preemption to laws "based on smoking and health." 15 U.S.C. § 1334(b). Our argument supports reading this provision to prohibit States from second-guessing the particular health

judgments that Congress has made in requiring the warnings in the statute—not, as Petitioners suggest, to limit any state regulation that might rest on some sort of health concern. If the States act on a different principle—that any label should be truthful, for example—then that is not preempted even if health is a reason for requiring such truthfulness.

The flaw in Petitioners' reading is readily discernible from a hypothetical case in which a cigarette manufacturer labeled its product as "low tar" even though the cigarettes in the package were, in fact, exactly the same as other cigarettes marketed without the "low tar" label. This would be a simple case under the generally applicable prohibition on fraud and misrepresentation. But surely a primary reason for prohibiting that fraud would be concern for the health of persons who might choose to smoke the ersatz "low tar" cigarettes. Prohibiting this form of mislabeling would not second-guess Congress's own judgments about "smoking and health" and accordingly should not be preempted under the Act.

B. The Labeling Act does not confer exclusive regulatory authority upon the Federal Trade Commission.

Petitioners' second key contention, that the Labeling Act confers exclusive regulatory authority over cigarette advertising on the FTC, is wrongheaded in both a general and a specific sense. The general point is that courts should read grants of authority to administrative agencies, which incorporate neither the political nor the procedural safeguards of federalism, narrowly. This is particularly true of the FTC—an agency whose

lawmaking capacity has always been controversial, limited, and concurrent with state authority.

1. **This Court should not lightly construe federal statutes as conferring exclusive jurisdiction on federal agencies.**

In our federal system, field preemption is rare. *See, e.g., Hillsborough Cty.*, 471 U.S. at 715-19 (1985). The more common situation is for the two sovereigns—federal and state—to exercise concurrent regulatory authority over a given area in a "cooperative federalism" arrangement. *See, e.g.,* Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1696-98 (2001). We show in the next section that this is eminently true of the tobacco labeling regime, which contemplates concurrent authority shared by the FTC and state institutions.

One of the key advantages of cooperative federalism arrangements is that they are institutionally diverse—that is, they combine public with private enforcement, *ex ante* legislative and administrative rulemaking at the federal level with *ex post* review by state courts, and analysis by bureaucratic experts with more democratically accountable action by state legislators and juries. Cooperative arrangements also provide a diverse array of remedies: federal law may be enforced through injunctions and fines; state tort regulation generally relies on compensatory awards to victims.

Each of these approaches has advantages and disadvantages, and

American policymakers have, in most areas, chosen to combine them rather than rely exclusively on one particular institutional arrangement. In this situation, the *Rice* presumption against preemption serves to protect this general default position. This Court should require clear evidence that Congress intended to depart from the normal cooperative federalism arrangement.

Private enforcement under state law has long been a bedrock feature of the consumer protection regime in this country. *See, e.g.,* Geraint G. Howells, *The Relationship Between Product Liability and Product Safety—Understanding a Necessary Element in European Product Liability Through a Comparison with the U.S. Position*, 39 WASHBURN L.J. 305, 307-308 (2000) (contrasting the U.S. and European systems). State lawsuits brought by private actors complement federal agency enforcement by supplementing limited federal enforcement resources and providing compensation for victims unavailable under federal law. Hence, even where Congress enacts legislation that brings particular aspects of consumer-related policy exclusively under federal auspices, it rarely displaces state remedies entirely.[7]

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[7] Congress often combines a preemption clause with a savings clause that leaves state remedies wholly or largely intact, *see e.g.,* Magnuson-Moss Warranty Act, 15 U.S.C. § 2311(b)(1); Federal Boat Safety Act, 46 U.S.C. § 4311(g); Airline Deregulation Act, 49 U.S.C. § 1506. Congress has expressly declined to extinguish state tort liability when preempting state-imposed labeling requirements on other tobacco products. *See* Comprehensive Smokeless Tobacco Health Education Act of

In the rare instances where Congress acts to displace all civil liability under state law, Congress generally provides an alternative means for private enforcement in federal courts. *Cf. Riegel v. Medtronic, Inc.*, 128 S. Ct. 999, 1015 (2008) (noting that the MDA's failure to create any federal compensatory remedy "suggests that Congress did not intend broadly to preempt state common-law suits grounded on allegations independent of FDA requirements.") (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)). Without the creation of such a scheme of federal remedies, the wholesale preemption of state law remedies deprives aggrieved individuals of redress for harms traditionally deemed compensable under the common law. *See Bates*, 544 U.S. at 449 ("The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.").

1986, 15 U.S.C. § 4406 (expressly preserving liability under state statutes and common law). Even where Congress elects to preempt state law causes of action in favor of a federal remedial scheme, it is likely to exempt from such preemption specific, potentially-overlapping areas of state law not arising out of the specific principle on which Congress has acted, s*ee, e.g.*, Employee Retirement Income Security Act, 29 U.S.C. 1144(b)(2)(A) ("nothing in this subchapter shall be construed to relieve any person from any law of any State which regulates insurance, banking, or securities.").

State judicial remedies also supplement the *ex ante* action of federal legislative or administrative rulemaking with an *ex post* judicial perspective that can focus on particular instances of regulated behavior in concrete cases. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 26 (1962). Although courts lack the specific expertise of federal agencies in a particular area—e.g., the medical effects of smoking—judicial application of general principles, such as fraud and misrepresentation, draws upon a longstanding common-law experience, and generalist courts may likewise be in a better position to harmonize consumer protection regulation with contiguous areas of law. Even with respect to expertise within a specific subject area, some degree of regulatory competition between federal and state regulators may provide incentives for developing expertise at each level that would not otherwise occur. Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 213. And preserving a role for state judicial remedies will often protect the constitutionally-rooted role of the jury in civil disputes. *See* U.S. Const. amend. VII; AKHIL REED AMAR, THE BILL OF RIGHTS 91-118 (1998) (highlighting the central importance of the jury, in both criminal and civil cases, to the Constitutional Framers).

Joint federal and state authority acts as a protection against problems raised by "agency capture." The potential for an agency to become "captured" by concentrated industry interests and

disregard more diffuse public interests has been recognized for over 50 years.[8] In these circumstances, state law may provide a backstop of regulation. State institutions are not themselves immune from capture, but the traditional American remedy for these problems has been to divide power among multiple competing institutions. *See* THE FEDERALIST No. 51, p. 349 (J. Cooke ed., 1961). Moreover, state legislatures (and some state courts) are democratically accountable in more direct ways and to different constituencies than are federal agencies. And the processes of these state institutions, including civil trials open to the public, will often be more transparent to the public at large than federal agency processes.

None of this is to say that state regulation or enforcement is inherently superior to federal. The point is simply that they are *different*—each has its strengths and weaknesses, and Congress has generally chosen to combine these distinct institutional approaches in most regulatory regimes. Both Congress and this Court have long recognized the value of state experimentation across a wide range of policy areas. *See, e.g., New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). Because concurrent jurisdiction is the norm in the federalist United States system, and because policy considerations support this concurrent

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[8] *See, e.g.,* MARVER BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 74-95, 169-71 (1955); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952); JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 74-88 (1990).

jurisdiction system, this Court should not lightly construe a statute as granting exclusive jurisdiction in a federal agency.

2. It is particularly unlikely that Congress would have vested exclusive jurisdiction in the FTC.

Petitioners claim that the Labeling Act preempted state regulation of cigarette advertising and vested all power to protect consumers in the FTC. The only possible source for this grant of power is 15 U.S.C. §1336, which states: "Nothing in this chapter (other than the requirements of section 1333 of this title) shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practices in the advertising of cigarettes." This refusal to limit the FTC's power cannot, however, bear the weight the Petitioners place on it.

Petitioners state that the Labeling Act had "no intention of insulating tobacco companies from liability for inaccurate statements about the relationship between smoking and health."[9] Pet'rs' Br. at 28. State laws are not necessary to prevent this from happening, it argues, because the Labeling Act granted power to the FTC, which has a "range of formal and informal regulatory tools that it has used to closely regulate tobacco companies claims about smoking and health since the 1920s." *Id.* But the

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[9] This Court has reached the same conclusion: "Congress offered no sign that it wished to insulate cigarette manufacturers from longstanding rules governing fraud." *Cipollone*, 505 U.S. at 529.

FTC did not possess an effective "range of formal and informal regulatory tools" at the time of the relevant amendment to the Labeling Act. Thus, a Congress that wished to preserve consumer protection from inaccurate statements would not have done so by placing exclusive regulatory powers in the FTC.

When the Labeling Act was amended in 1970, vesting all regulation of tobacco labeling and advertising in the FTC to the exclusion of generally applicable state laws would have left consumers with little protection against false and misleading advertising and labeling of cigarettes. The FTC initially had power to act only through cease and desist orders. It took a long time to get a cease and desist order, a problem that led to what was described as "regulatory anemia." S. Rep. No. 93-151, 93d Cong., 1st Sess. 9-10 (1973). An ABA report on the FTC stated that "Problems of delay have vexed the FTC ever since it was established." Report of the ABA Commission to Study the Federal Trade Commission 28-32 (1969). The same report discussed at least one cease and desist order issued more than seven years after the initial investigation. *See id.* Moreover, the slow and involved process of obtaining cease and desist orders against each wrongdoer gave offenders two bites at the apple: the FTC had to prove that the action was unlawful through the cease and desist proceeding, and then could only enforce the orders prospectively. This two-step process further limited the effectiveness of FTC regulation.

While the FTC began issuing "trade regulation rules" in 1962, its rulemaking power was very much in question in 1970. Congress specifically refused to

address whether the FTC had such power when it enacted the amendments to the Labeling Act. *See* Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, §2, 84 Stat. 89 (1970).[10] In 1972, the District Court for the District of Columbia concluded that the FTC did not have power to issue trade regulation rules. *National Petroleum Refiners Assn. v. FTC*, 340 F. Supp. 1343 (D.D.C. 1972). The Court of Appeals reversed the next year. *National Petroleum Refiners Assn. v. FTC*, 482 F.2d 672, 690 (D.C. Cir. 1973). The issue was not completely settled until rulemaking power was explicitly granted to the FTC in 1975. Act of Jan. 4, 1975, Pub. L. No. 93-637, §202(a), 88 Stat. 2193, *creating* 15 U.S.C. §57a(1)(B).

In addition to arguably not having rulemaking power, the FTC was not granted general injunctive power until 1973. Act of Nov. 16, 1973, Pub. L. No. 93-153 §408(f), *amending* 15 U.S.C. §53(b); *see* H.R. REP. NO. 93-1107, 93d Cong., 2d Sess. 34 (1974). The FTC also was not granted power to sue for redress of injuries to consumers until 1975, well after the amendments to the Labeling Act. Act of Jan. 4, 1975, Pub. L. No. 93-637, §206, *creating* 15 U.S.C. §57b.

Finally, the jurisdiction of the FTC was somewhat limited until 1975, because the statute until then extended the agency's power only to actions "in commerce," rather than actions "in or affecting commerce." *Id.* at §201, *amending* 15 U.S.C.

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[10] This unanswered question is another indication that Congress did not intend to vest exclusive regulatory power in the FTC; it would be very odd to do so without even establishing what powers of enforcement the agency possessed.

§45. The FTC arguably could not have addressed any wholly intrastate action, which would have left any local frauds untouchable if state actions had been completely preempted. *See FTC v. Bunte Brothers*, 312 U.S. 349, 355 (1941).

Not only is it unlikely that Congress would have vested exclusive regulatory power in such an "anemi[c]" agency, but Congress would also have been likely to follow the general practice of the FTC acting in concert with state regulation, not as a replacement therefore. The FTC Act itself states explicitly: "Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." 15 U.S.C. 57b(e). The legislative history to the 1975 Magnuson-Moss Warranty—Federal Trade Commission Improvement Act supports this concept, stating that that the expansion of FTC jurisdiction is not intended to preempt state agencies from carrying out local protection of consumers. *See* S. Rep. No. 93-151, 93d Cong., 1st Sess. 27 (1973); H.R. Rep. No. 93-1107, 93d Cong., 2d Sess. 45 (1974). In addition, the Conference Report to the Act states that private actions for redress would not be barred by the FTC first filing suit for redress based on the same acts. H. R. Rep. No. 93-1606, 93d Cong., 2d Sess. 41 (1974).

In fact, the FTC itself worked with states to draft state deceptive trade practices acts. William A. Lovett, *State Deceptive Trade Practice Legislation*, 46 TUL. L. REV. 724, 730 (1972). Within two years of the Labeling Act amendments, 36 states had enacted legislation like the model act proposed in 1967. Twelve of those states included a private right of action in their statutes—a feature of the model act

that went beyond any power held by the FTC at the time. Congress was acting against this background of concurrent actions by the FTC and the states in 1970.

This Court has determined that Congress would not lightly upset a traditional sharing of regulatory responsibilities between federal agencies and the states. In *Gonzales v. Oregon*, 546 U.S. 243, 274 (2006), the Court recognized that Congress would not vest regulation of the medical profession—a traditional state matter—in a federal agency without clearly stating that it was doing so.[11] Similarly, in this case, vesting all regulatory power in the FTC would displace the state regulation that traditionally coexisted with FTC enforcement. Congress would not have used the "obscure grant of authority" in 15 U.S.C. §1336 to effect such displacement.

The particular regulatory context of this case thus reinforces the general points made earlier: Congress does not lightly or ambiguously confer exclusive authority on federal agencies, and the FTC is a particularly unlikely candidate for such authority.

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[11] "[T]he background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power." *Gonzales*, 546 U.S. at 274. The Court went on to state: "It is unnecessary even to consider the application of clear statement requirements or presumptions against preemption to reach this commonsense conclusion." *Id.*

III. Plaintiffs' Claims Are Not Impliedly Preempted.

Just as Congress has not granted exclusive regulatory authority to the FTC, it has also not endowed every aspect of FTC "policy" with the same preemptive force as federal statutes. This fact forecloses the conclusion that the FTC's informal actions with regard to "low tar" cigarettes impliedly preempt Respondents' state law claims.

A. Preemption of State Law Must Always Be Rooted in *Congress*'s Action.

The text of the Supremacy Clause identifies three categories of supreme federal law: "[t]his Constitution"; "the Laws of the United States which shall be made in Pursuance thereof"; and treaties. U.S. CONST. art. VI, cl. 2. This Court has recognized that "a federal agency *acting within the scope of its congressionally delegated authority* may pre-empt state regulation," *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986) (emphasis added), but the italicized language confirms what the Supremacy Clause would in any event require: an agency's authority to preempt state law is entirely derivative of *Congress*'s authority.[12] Even in cases involving

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[12] In *INS v. Chadha*, 462 U.S. 919 (1983), this Court affirmed the importance and exclusivity of the Article I lawmaking process. In response to Justice White's dissent, which noted the pervasive phenomenon of administrative lawmaking outside Article I processes, *id.* at 985–86, the Court insisted that

> [e]xecutive action under legislatively delegated authority that might resemble "legislative" action in some respects . . . . is always subject to check by the terms of the legislation that authorized it; and if that

administrative agency action, this Court has insisted that Congress's intent is the "touchstone" of preemption analysis. *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996).

Congressional and agency action, of course, are often closely intertwined in preemption cases. But Petitioners' implied preemption argument in this case manages to separate them to a striking and unusual degree. Petitioners' argument that the federal *statute* in question—the FCLAA—impliedly preempts state law is quite literally a footnote to their primary contention, which is that Respondents' claims conflict with "the FTC's low-tar policy." Pet'rs' Br. at 46 n.11. The statutory argument consists entirely in the assertion that the Labeling Act "was enacted to establish a 'comprehensive Federal program to deal with' health-related statements in 'cigarette labeling and advertising.'" *Id.* (quoting 15 U.S.C. § 1331). But this unelaborated assertion of field preemption flatly contradicts the holding of *Cipollone* that some state regulation in this area remains permitted, *see* 505 U.S. at 523-24 (plurality), as well as the United States' position that FTC regulation is meant generally to operate alongside state law. U.S. Br. at pp. 2-4.

This Court has never, to our knowledge, found conflict preemption based solely on an agency's own articulated policy, where that policy does not purport

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> authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.

Id. at 953–54 n.16.

either to be an interpretation of Congress's own mandate or an exercise of authority delegated by Congress to the agency to act with the force of law. Just as Congress's intention is the "touchstone" of express preemption analysis, so too *conflict* preemption depends on the identification of a conflict between state law and either a federal statutory policy or an agency course of action pursuant to a congressional delegation of authority to act with legal force. Even if the FTC had articulated a clear policy allowing the use of Respondents' "low tar" descriptors—a disputed matter outside the scope of this brief—it would fit neither of these conditions for preemption.

B. The FTC's "low tar" policy cannot preempt state law.

There are two sorts of cases in which agency action can preempt state law, either as a matter of express or conflict preemption. First, the agency may interpret a statute as preempting state law. These cases present an unresolved question concerning whether courts should accord the agency's interpretation some degree of deference, given the general "presumption against preemption" in statutory construction. *See Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559, 1572 (2007) (noting but not resolving this question).[13] Second, an agency may itself take action, pursuant to a delegation of authority from Congress, that preempts state law.

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[13] *See also* Nina A. Mendelson, *A Presumption Against Agency Preemption: Federal Agency Authority to Preempt State Law*, 102 NW. U. L. REV. 695 (2008); Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727 (2008).

The question in this category of cases concerns which sorts of agency action may have this effect.[14]

The present case falls in the second category. The FTC's "low tar" policy is not an interpretation of the Labeling Act; as the *amicus* brief submitted by the former FTC Commissioners makes clear, this policy's origins pre-dates the Labeling Act, which simply recognizes (and refuses to expand) the FTC's preexisting authority. Fmr. Comm'r Br. at 10-13.[15] The "low tar" policy is thus a creature of the FTC's general authority to prevent unfair trade practices. *See id.* at 7-8 (citing the FTC's general rulemaking and adjudication authority as the basis for the policy). Nor has the FTC interpreted its organic

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[14] *Cf. Global Crossing Telecomms., Inc. v. Metrophone Telecomms., Inc.*, 127 S. Ct. 1213, 1528 (2007) (Scalia, J., dissenting) (distinguishing between "interpretive regulations (by which I mean regulations that reasonably and authoritatively construe the statute itself) and . . . substantive regulations (by which I mean regulations promulgated pursuant to an express delegation of authority to impose freestanding legal obligations beyond those created by the statute itself)"). In our view, either sort of regulations may be preemptive, but they raise different questions.

[15] *See* 15 U.S.C. § 1336 ("Nothing in this Act (other than the requirements of section 4 [15 USCS § 1333]) shall be construed to limit, restrict, expand, or otherwise affect the authority of the Federal Trade Commission with respect to unfair or deceptive acts or practice in the advertising of cigarettes."). Aside from requiring FTC approval of plans for rotating the congressionally-prescribed warning labels on tobacco packaging, 15 U.S.C. § 1333(c), and providing for an FTC representative on the Interagency Committee on Smoking and Health, 15 U.S.C. 1341(b)(1)(A), § 1336 is the Labeling Act's only reference to the FTC.

statute to preempt state law here. As all concede, the FTC Act does not generally preempt concurrent state authority over unfair trade practices.

Congress has, of course, delegated authority to the FTC to identify and prohibit "unfair or deceptive acts or practices." *See* 15 U.S.C. § 45(a). The question is which sorts of agency action, taken pursuant to a delegation of this kind, have the preemptive force of supreme federal law. This Court's *Chevron* jurisprudence has made clear that all agency actions are not created equal: sometimes agencies act "with the effect of law," and sometimes their actions lack such force. *See, e.g., U.S. v. Mead Corp.*, 533 U.S. 218, 229 (2001); *Christensen v. Harris Co.*, 529 U.S. 576, 586-87 (2000). In the preemption context, it is particularly critical that this Court establish rules that are as predictable and stable as possible to indicate which agency actions have preemptive force and which do not.[16]

Petitioners in this case appear to invite an open-ended inquiry into the history, consistency, and policy weight of particular agency practices as a means to determine the weight of those practices. That sort of approach is unlikely to give state and federal regulators fair notice of the preemptive effects of federal agency action; likewise, it provides little constraint on reviewing courts to prevent them from holding preempted state policies that do not accord with their own policy preferences (or at least appearing to rule in this way). We recognize that

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[16] *Cf. Lopez*, 514 U.S. at 630-31 (Breyer, J., dissenting) (emphasizing the importance of legal certainty in defining the relative scope of state and federal regulatory authority).

this Court' *Chevron* jurisprudence, which differentiates between agency actions with the force of law and other, less authoritative actions, is not always a model of clarity. But we think it is preferable to the more open-ended approach offered by Petitioners, and in any event it makes sense that the *Chevron* and preemption inquiries should dovetail.[17]

Applying this criterion, the FTC's "low tar" policy can have no independent preemptive force.

1. The FTC has not exercised the exclusive rulemaking procedures required by Congress.

The extent to which the FTC is authorized to make rules with the force of law has been controversial for much of its history. Congress resolved the matter in the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act of 1975, 88 Stat. 2183 (codified at 15 U.S.C. §§ 45 *et seq.*), which conferred explicit power on the

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[17] As the Court has explained, the reason for *Chevron* deference is that Congress has delegated authority to the agency to fill a statutory gap by taking action with legal force. *Mead*, 533 U.S. at 229. This same quality—legal force, derived from congressional delegation—is what makes agency action preemptive under the Supremacy Clause.

We note, however, that the power of substantive agency action to preempt state law is a distinct issue from the deference owed to an agency's interpretative judgment that a particular federal measure has preemptive effect. *See* Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869 (2008). Even where an agency can act with legal force, we do not concede that the agency's interpretive judgments should receive *Chevron* deference. *See id.* and sources cited in note 13, *supra*.

Commission to make "interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 57a(a)(1)(A), as well as "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce," 15 U.S.C. § 57a(a)(1)(B). When the FTC makes substantive or legislative rules under the latter provision, however, the Act requires it to follow specific rulemaking procedures that are generally stricter than the usual requirements under the Administrative Procedure Act. *See* 15 U.S.C. §§ 57a(b), 57b-3.

These heightened procedural requirements reflect Congress's desire to empower the FTC to act with the force of law, but also to confine that authority within relatively narrow limits. Whether or not the FTC in fact has a coherent "low tar" policy, there is no dispute that the agency has never embodied any such policy in substantive rules promulgated pursuant to § 57a. To accord preemptive weight to "policies" that have been articulated in less formal fashion would obviate the specific procedural requirements of § 57a. See FTC Operating Manual (June 25, 2007) ch. 8.3.2, available at http://www.ftc.gov/foia/ adminstaffmanuals.shtm (stating that the industry guide "does not have the force or effect of law and is not legally binding on the Commission or on the public in an enforcement action").

We are unaware of any cases where preemptive effect has been accorded to agency "policies" not embodied in rules that have the force of law; indeed, preemption of conflicting state policies is

part and parcel of what it *means* to act with the force of federal law.[18] Petitioners cite *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002), for the proposition that "even an agency's decision *not* to engage in regulation can preempt state law." Pet'rs' Br. at 52. But that case—which found that the agency decision in question did *not* preempt state law—involved a statutory preemption clause which arguably rendered any supplemental state regulation preempted.[19] Hence, if the agency had considered state law preempted, that would have amounted to an interpretation of the statute with no need to rely on the preemptive force of the agency's own actions. Moreover, the Coast Guard's regulatory approach to the matters considered in *Sprietsma* was to promulgate all regulations that it intended to have the force of law by notice and comment rulemaking. *See* 537 U.S. at 59-62. *Sprietsma* is thus a very odd case to cite for the proposition that agency decisions not to regulate have broad preemptive consequences. *See id.* at 65 ("It is quite wrong to view that decision ["the Coast Guard's decision not to adopt a regulation"] as the functional equivalent of a regulation prohibiting all States and their political subdivisions from adopting such a regulation.").

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[18] *See Wabash Valley Power Assn. Inc. v. Rural Electrification Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) (Easterbrook, J.) ("We have not found any case holding that a federal agency may preempt state law without either rulemaking or adjudication.").

[19] *See* 46 U.S.C. § 4306 (preempting state regulation "not identical to" federal regulation unless affirmatively "permitted by the Secretary").

The other cases relied upon by Petitioners are likewise off target. Petitioners cite *Geier v. American Honda Motor Co.*, 529 U.S., 861, 885 (2000), for the proposition that preemption does not require "a specific expression of agency intent to pre-empt, made after notice-and-comment rulemaking," *see* Pet'rs' Br. at 52, but this statement goes to the clarity with which an agency must express its intent to preempt—not to the character of the agency action that must form the *basis* for the preemption. *Geier* concerned the preemptive impact of a Federal Motor Vehicle Safety Standard, which is a legislative rule promulgated after notice and comment rulemaking. *See Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 40-41 (1983). *Geier* certainly did not hold that preemption could occur based on a conflict between state law and some lesser form of agency action.

Petitioners' invocation of the filed rate doctrine, Pet'rs' Br. at 52, is equally unhelpful. Although Congress has prescribed particular ratemaking procedures, distinct from notice-and-comment rulemaking or formal adjudication *see, e.g.*, 15 U.S.C. § 717c (specifying the natural gas ratemaking procedures at issue in *Ark. La. Gas Co. v. Hall*, 453 U.S. 571 (1981), relied upon by Petitioners), no one can dispute that Congress has authorized ratemaking agencies to act with the force of law. *See also* 5 U.S.C. § 551(4) (defining ratemaking as a "rule" under the APA). Nor could anyone assert that ratemaking action taken in disregard of the particular procedures specified by Congress would have legal force. Similarly, the FTC is empowered to act in a variety of informal ways, but if it wishes its

actions to preempt state law, it must utilize the rulemaking procedures specified in the statute.

2. FTC consent orders do not have the force of law with respect to non-parties.

Other than informal statements of policy, the most concrete embodiment of the FTC's alleged "low tar" policy is a series of consent agreements that the FTC entered into with various tobacco companies indicating the use of certain descriptors, in certain situations, would not be regarded as deceptive *per se*. It is true that for much of its history, the FTC proceeded primarily by adjudication rather than rulemaking, and this Court has considered formal adjudication as largely equivalent to notice-and-comment rulemaking in its *Chevron* jurisprudence. *See Mead*, 533 U.S. at 230-31. But a consent order is not a formal adjudication, and Petitioners' position flies in the face of this Court's clear precedent that consent orders ordinarily bind only the parties to the dispute. *See Martin v. Wilks*, 490 U.S. 744 (1989); *Wabash Valley Power Assn. v. Rural Elec. Admin.*, 903 F.2d 445, 454 (7th Cir. 1990) (Easterbrook, J.) (relying on *Martin* to reject argument that an FTC consent order preempts state law). As Judge Easterbrook has pointed out, "[w]hether the decree has [preemptive] effect should depend on whether it was adopted by the agency as its own policy following the procedures the APA requires; then the preemption would come from substantive rules rather than the parties' assent." *Id.*

We suspect, moreover, that according preemptive effect to agency consent orders would make it considerably more difficult for federal

agencies to settle cases. See, e.g., *In re Beatrice Foods*, 86 F.T.C. 1, 50 (1975) ("[A] determination that consent orders are controlling precedents would severely limit the use of the consent settlement process."). Any state with a regulatory policy that might be affected by such a settlement would have an incentive to intervene in the proceedings in order to argue against a preemptive outcome. This impractical scenario highlights the basic considerations of administrative fairness and federalism at issue here: administrative action that affects broad categories of persons should not occur without some opportunity for affected persons to participate, and federal action that affects the *States* is particularly subject to checks based on representation and participation. *See Garcia*, 469 U.S. at 550-54.

CONCLUSION

Current constitutional doctrine affords Congress broad authority to preempt state law. If meaningful balance in our federal system is to be preserved, the courts must not overread the preemptive scope of the legislation that Congress enacts. It is for Congress, not the federal courts, to expand the preemptive force of federal regulation into areas of health and safety regulation that have long been subjects of state authority. And courts must be particularly careful not to accord preemptive force to action by federal *agencies*—which elude both the political and procedural safeguards of federalism—except when such agencies are either interpreting Congress's statutes or acting within clear delegations of authority to act with the force of law. In this case,

these principles require Respondents' state law claims to go forward.

Respectfully submitted,

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